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No. 80.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

MURPHY OIL COMPANY, a Corporation,
Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

PETITION FOR REHEARING.

RANDOLPH E. PAUL,
Counsel for Petitioner,
40 Wall Street,
New York City.

Of Counsel:

THOMAS R. DEMPSEY,
A. CALDER MACKAY,
1104 Pacific Mutual Building,
Los Angeles, California.

KENYON F. LEE,
BRADNER W. LEE,
Herman W. Hellman Building,
Los Angeles, California.

FERRIS D. STONE,
EDWARD S. REID, JR.,
Penobscot Building,
Detroit, Mich.

THE COURT PRESS, INC.

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COMES NOW the above named petitioner, Murphy Oil Company, by its attorney, Randolph E. Paul, and presents this its petition for a rehearing of the above entitled cause under Rule 33 of the Revised Rules of the Supreme Court of the United States, and in support thereof respectfully shows:

Judgment was entered on December 5, 1932.

The opinion of this Honorable Court establishes certain principles which dispose of the propositions formerly urged by petitioner. This petition is not an attempted reiteration of these rejected arguments in the guise of an attack upon the language of the opinion. We ask a rehearing only in order to obtain for this taxpayer the benefit of the application of the principles now settled by the Court. Unless this Court reconsiders the specific result in this case, we shall find ourselves the only taxpayer denied the boon of the decision reached in our own case—that royalties may be entirely a return of capital.

The two principal propositions of the opinion of this

Court are: (1) that there is no distinction between a bonus and royalties (following *Burnet* v. *Harmel,* decided November 7, 1932) with respect to the depletion allowance granted by the statute, and (2) that article 215 (a) as amended was "reasonable" within the meaning of the statute. The petitioner claims that it did not *in this very case* receive the benefit of this Honorable Court's opinion.

The Court, after referring to the lack of distinction between bonuses and royalties, states that the question remains (italics ours):

> "* * * whether the method followed by the Commissioner *in this case* in allocating depletion to bonus and royalties failed to afford that 'reasonable allowance' for depletion which the statute provides."

Discussing the amended regulation the Court then states that if the bonus and expected royalties together (italics ours):

> "* * * are not found to exceed the capital investment of the lessor, the entire bonus received in advance of royalties must be treated, after the amended regulation as well as before, *as a return of capital, since, in that case, the expected royalties added to the bonus are, by hypothesis, sufficient to return no more than the lessor's capital.*"

The Court adds:

> "Such was the case here."

Since there is no distinction between a bonus and royalties and since the bonus and expected royalties together are not found to exceed the capital investment of the lessor, it follows that the bonus is, in the language of the Court, "a return of capital". It follows inescapably

from this reasoning of the Court that the *royalties* also must be treated as a return of capital. There is no stopping short of this conclusion.

This has not been done. The deficiency herein, approved by the Circuit Court of Appeals, is a tax upon income consisting of royalties. The tax is on royalties which are, by hypothesis, "a return of capital".

While the Court clearly finds that the sum of the bonus and the expected royalties does not equal the invested capital of the taxpayer, the Commissioner may in answer urge that the reason for this conclusion is the failure of the taxpayer to prove expected royalties. This being a matter of adjective law, we have discussed it in an appendix to this petition, to which the Court's attention is respectfully directed.

It is respectfully submitted that under the Court's decision in *Burnet* v. *Logan*, 283 U. S. 404, the petitioner herein received no taxable income until all its capital sum (the value of its property at March 1, 1913) had been returned either in the form of bonus or royalties.

Petitioner regrets that its unavoidable delay in filing a supplemental brief after the oral argument may have prevented the adequate consideration by this Honorable Court of the facts bearing upon the good faith of its argument to the Court and of the arguments bearing upon the question of legislative approval of the regulation in question.

It is obvious that the opinion herein has taken a strange and unexpected turn which neither litigant could reasonably have anticipated. It is a simple matter of doing justice, therefore, to remand the case. *Underwood* v. *Commissioner*, 56 F. (2) 67, 73 (C. C. A. 4th 1932) remanding 20 B. T. A. 1117. Under this Court's opinion, both bonus and royalties were a return of capital if together they did not exceed the capital sum. They were in part a return of

capital and in part income if together they amounted to more than the capital sum. The facts in this regard should be ascertained. It is, therefore, prayed that this petition for rehearing be granted and that the cause be remanded in order that these facts may be ascertained and justice done.

Respectfully submitted,

RANDOLPH E. PAUL,
Counsel for Petitioner,
40 Wall Street,
New York City.

Of Counsel:

THOMAS R. DEMPSEY,
A. CALDER MACKAY,
1104 Pacific Mutual Building,
Los Angeles, California.

KENYON F. LEE,
BRADNER W. LEE,
Herman W. Hellman Building,
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EDWARD S. REID, JR.,
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Certificate of Counsel.

I, RANDOLPH E. PAUL, counsel for the above named petitioner, Murphy Oil Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RANDOLPH E. PAUL,
Counsel for Petitioner.

APPENDIX.

It is to be noted that the deficiency in this case was assessed by the Commissioner on February 6, 1926 (RI-18),* prior to the promulgation of the amended regulation on November 13, 1926. The sixty-day letter proposing the deficiency was based upon the original regulation considering the bonus entirely a return of capital and allowing depletion, measured by production, upon the reduced base. It was upon this sixty-day letter that the pleadings in the case were based.

Had the sixty-day letter issued after the promulgation of the amended regulation, it would have been the duty of the Commissioner to have himself estimated the expected royalties and, in the event that these expected royalties when added to the bonus did not equal the taxpayer's capital sum, the Commissioner would have been obliged to have allowed the expected royalties entirely as a return of capital in accordance with the amended regulation (and in accordance with the opinion of this Honorable Court in this very case). By promulgating the amended regulation after the issue of the sixty-day letter, the Commissioner places taxpayer at a tremendous disadvantage in that the Commissioner in proposing the deficiency attempts to avoid the necessity of complying with the amended regulation but requires the taxpayer itself to prove expected royalties on the theory that it has not only the burden of proof to establish that the deficiency proposed by the Commissioner is wrong but also the burden of proof to show what the proper tax is. As a matter of fact, the amended regulation was first injected into the proceedings *after* the hearing before the Board of Tax Appeals and in the brief of the Government.

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* The record is a consolidation of the record in two appeals, there is therefore a duplication of page numbers. The figure I refers to the record in No. 6388.

For the Court to deprive this taxpayer of the practical advantages of the principles now enunciated by it simply because taxpayer did not prove expected royalties is, it will be seen, to punish taxpayer severely for a situation which arose entirely because of the promulgation of the amended regulation after the issue of the sixty-day letter.

Taxpayer justifiably assumed that the Commissioner intended the amended regulation to be prospective only in its operation, since the new regulation had been in existence nearly two years at the time of trial and yet the Commissioner allowed the trial to proceed on the theory of the old regulation. When the Commissioner did shift his position to the amended regulation, in his brief, the proofs were closed.